No. 2528.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN A. JESSON, et al.,

Appellants,

vs.

F. G. NOYES, Receiver, etc.,

Appellee.

## Petition for Rehearing.

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## PETITION FOR REHEARING.

Appellants respectfully petition the Court for a rehearing of this cause and in support of their application urge the following:

I.

The Court in its opinion has through inadvertence misstated certain facts and so has been led to conclusions not justified by the record. These statements all relate to the Barnette trust deeds, and are thus stated in the opinion.

(1) "He [Barnette] stipulated in his deed that the receivers were not to take possession of

the property conveyed, nor the rents, issues or profits thereof, nor had any right to the possession or use thereof at any time prior to November 18th, 1914."

(2) "The receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before November 18th, 1914, and the appellee so pleaded its effect in the reply.

(3) "The property was not surrendered absolutely for the payment of the depositors and holders of unpaid drafts but for the payment of a deficit to be thereafter ascertained as between the amount due depositors and owners of unpaid drafts and the amount realized by the receivers out of the property and assets of the bank.

(4) "None of the proceeds of the property so surrendered by Barnette can be applied to the payment of depositors and holders of unpaid drafts until all the property and assets of the bank shall have been realized and devoted to liquidation.

(5) "There was imposed upon the receivers, when they accepted the surrender, the obligation to pursue all available remedies to recover the assets, including, we think, the assets which may be recovered in the present suit."

## II.

The Court in its opinion discusses certain propositions which were not argued or briefed on the appeal and has reached certain conclusions which we submit are erroneous, as follows:

(1) The Court is in error in holding that the complaint states a common law cause of action for

the recovery of the moneys paid for stock surrendered.

(2) The Court is in error in holding that the District Court of Alaska is a court of the United States and so was entitled to take judicial notice of the Nevada Statute.

III.

The Court has misconceived the effect of the Barnette deeds, and so has been led to ignore our defense (Tr., p. 131), that the moneys received by the receiver pursuant thereto should be applied *pro tanto* to the satisfaction of the liability of these appellants.

THE BARNETTE DEEDS.

We most respectfully submit, that this Court has erred in respect to the intent and effect of these so-called trust deeds, executed by Barnette and his wife in favor of the receivers, and this error, we believe, is a result of a misunderstanding by this Court (a) of the facts set forth in said trust deeds; in the petition of Barnettes filed with the Court accompanying the same; the petition of the receivers for instructions; and the order of the Court thereon; and the admissions of the receiver in his pleadings, as well as (b) by the failure of the Court to consider the last, further and separate defense of the appellants (T., 131) to the effect that any money or property received by the receivers in consideration of their covenant not to sue

should be applied in full or partial satisfaction of the liability of these appellants.

This Court, in not allowing the contentions of the appellants—that the acceptance by the receivers of the promises of Barnette and wife, and the conveyance of the property to the receivers to secure the performance thereof; and the right to apply the issues and profits of the Alaska properties in satisfaction of the claims of the depositors and holders of unpaid drafts at such times as the Court might direct, was satisfaction and extinguishment of the liability of Barnette or at least was a covenant not to sue Barnette and thereby operated to extinguish the appellants' liability to the extent of the value of any money or property received by the receivers therefrom, used the following language:

> "There is nothing in the record to show that Barnette stipulated for release from liability from his own acts or for the acts of his associates in the management of the bank. *He stipulated in his deed that the receivers were not to take possession of the property conveyed, nor the rents, issues and profits thereof, nor have any right to the possession or use thereof at any time prior to November 18, 1914.* . . . None of the proceeds of the property so surrendered by Barnette can be applied to the payment of depositors and holders of unpaid drafts until all of the property and assets of the bank shall have been realized and devoted to liquidation."

The Court has inadvertently fallen into an error here in assuming that the trust deeds were identical in

their provisions. There were, it will be remembered, two trust deeds, one conveying property in the Republic of Mexico, and the other conveying property in Alaska. The Alaska property conveyed consisted of real estate in the town of Fairbanks and elsewhere, and mining claims in the vicinity of Fairbanks. *As to these properties it was stipulated* (T., 1043) *that the receiver should take immediate possession and collect the rents, issues and profits.* It was from this source and from the sale of certain of the properties that the sum of $30,905.65 was realized.

The petition filed by Barnette and wife contained the following:

> "And your petitioners . . . further desire that the rents, issues and profits of said real estate and lands situate in the said Fairbanks precinct, shall be collected by the said receivers, . . . and after deducting the reasonable charges for collecting same and taxes and insurance and other expenses, *shall be paid pro rata to the said depositors at such time and in such manner as this honorable Court may hereafter direct*" (T. 944-5).
>
> "And your petitioners . . . desire that if at any time your said petitioners, . . . and each of them, and the said receiver, their successors or successor, shall deem it more advantageous to sell and dispose of, than to hold and retain any of the property situate in said Fairbanks precinct, then the same may be sold and the proceeds derived therefrom shall be delivered over to the said receivers, their successor or successors, to be by them or him paid to the depositors in the way and manner herebefore suggested for the payment of

the rents, issues and profits to the said depositors" (T. 945).

"It being the intent, desire and express wish of said petitioner and each of them and they and each of them do hereby promise and agree to pay the said depositors in full *not later* than the said 18th day of November, 1914" (T. 944).

"That said E. T. Barnette and said Isabelle Barnette, his wife, each desire to grant and convey unto the aforesaid receivers of said Washington-Alaska Bank the said real estate and lands, to be held in trust by the said receivers, their successor or successors, *as security for payment to the said depositors of all sums of money which are now due, owing and payable to said depositors"* (T. 940-1).

"That it is the desire and intention of your petitioners, and each of them, that all said depositors in said Washington-Alaska Bank shall be paid in full their respective deposits, together with interest thereon at the rate of *6* per cent. per annum from the 4th day of January, 1911, until paid, and *not later than* the 18th day of November, 1914" (T. 946-7).

And "your petitioners, and each of them, come into this court and pray:" . . .

"(2) That said order *shall also direct the said receivers, their successor or successors, to collect the rents, issues and profits* derived from the real estate and lands situate in the Fairbanks precinct, Alaska, and disburse and *pay same,* in keeping with the suggestion and request contained in the above petition" (T. 947).

"(3) That said order direct that *if the depositors of the said Washington-Alaska Bank be not paid in full,* including interest upon their said deposits at the rate of six cents per annum, by the 18th day of November, 1914, then the said receivers, their successors or successor, shall sell

and dispose of all said real estate and lands, for the best price obtainable, and the proceeds derived from such sales be applied, first, in payment of said depositors' accounts, together with interest, and the residue, if any, be delivered to the petitioners, E. T. Barnette and Isabelle Barnette, his wife" (T. 947).

The trust deed for the Alaska property contained the following:

"That it has at all times since (the closing of the bank) *appeared,* and is *now apparent,* that there is and will be a large *deficiency* as between the obligations of said banking institution to its depositors and the owners of unpaid drafts on the one side and the proceeds of its property and assets on the other; that by reason of all the premises, the said E. T. Barnette, has heretofore assumed and taken upon himself the obligation to pay the depositors and owners of said banking institution. . . . any deficit that may hereafter be ascertained, as between the amount due each depositor and owner of unpaid drafts . . . with interest . . . and the amount realized out of the property and assets of said bank *and paid to such creditors;* that the amount of such deficit is not known at this time, and cannot be ascertained at any particular period of time in the near future that can now be named, but will be so ascertained by or before November 18th, 1914" (T. 1043).

"It is therefore understood and agreed between the parties hereto that the parties of the second part *may take immediate possession* of all of the property above described and improvements and appurtenances thereunto belonging and thereafter continue to manage, control, lease the same if

necessary, and collect and receive the rents, issues and profits thereof and after deducting reasonable charges for collecting the same, taxes, etc., . . . they shall return to the said court and its receivers the net amount of such rents and profit, *the same to be disbursed by the said court through its receivers pro rata to the said depositors and owners of unpaid drafts heretofore issued by said bank*" (T. 1043).

"And if at any time after the delivery of this deed the said trustees . . . and said parties of the first part shall deem it more advantageous to sell and dispose of than to hold and retain any of the real property above described, then the same may be sold to the purchaser or purchasers by the said trustees, and the proceeds derived from such sale or sales shall by said trustees be delivered to the said court or its receivers and be disbursed under the order of the court pro rata to the said depositors and owners of unpaid drafts; but if it should happen that on the 18th day of November, 1914, the demands of depositors and owners of unpaid drafts of the said bank, with six per cent. per annum interest thereon from January 5, 1911, have not been fully paid and satisfied, either out of the property and assets of said bank as administered by the said receivers, or otherwise, or have not been fully paid and satisfied by the said E. T. Barnette, then the said second parties are authorized to sell the said property and apply the proceeds of said sale in full liquidation of the claims of said creditors" (T. 1044).

The deed for the *Mexican* property provided that the receivers were not to take possession of the same nor have any right to the possession and use thereof

at any time prior to November 18, 1914. This is undoubtedly what led the Court to make the statement in the opinion above referred to. That deed further provided that if upon said date the demands of the depositors and owners of unpaid drafts with interest, have not been fully paid and satisfied, *"either out of the property and assets of the said bank as administrated by the said receiver, or otherwise, or have not been fully paid and satisfied by the said E. T. Barnette,"* then the receivers might take immediate possession of said real estate, and sell the same,

> "and receive the purchase price and turn the same into said court and pay out so much thereof as may be needed to fully liquidate and pay any balance that may remain unpaid of the claims and demands of the depositors and owners of unpaid drafts of said bank, said money to be disbursed under the order of said court" (T. 1033-34).

The Mexican deed then recites that G. Edgar Ward and W. D. Beggs have a contract with Barnette for the purchase of forty-nine per cent. of the Mexican property,

> "in which agreement and contract it is provided that they [Ward and Beggs] will on or before November 18th, 1914, pay to the said E. T. Barnette, the several sums of money mentioned therein, viz: One of Two Hundred Thousand ($200,000) Dollars and interest; another of Twenty-six Thousand and Twenty-five Dollars ($26,025.00) and interest, and other contingent sums mentioned in paragraph four of the said contract . . ."

The deed then provides:

> "Now, therefore, upon all of the considerations hereinbefore mentioned, *if at any time after the delivery hereof and on or prior to November the 18th, 1914,* the said George Edgar Ward and W. D. Beggs, mentioned in the contract, shall express a willingness and desire to pay the said E. T. Barnette any part or all of the sums or sum of money mentioned therein, then the parties of the first part do hereby authorize and empower the parties of the second part and their successors to collect and receive from the said Ward and Beggs such payments, and the said Ward and Beggs are hereby authorized to pay the same to said trustee or trustees herein, such moneys if so paid and received *to be disposed of by second parties in the manner above directed for the distribution of the proceeds of the sale of the land conveyed,* provided always that at the time of such payment there remains something still due to the creditors of said bank" (T. 1034-5).

The receivers in their petition to the Court among other things recite:

> "The rents and issues of the city lots amount to a considerable sum—as much as six hundred and fifty dollars ($650) per month net as we are informed" (T., 951).

The order of the Court directing the receivers to accept the trust deed ordered

> "that you take the necessary steps to secure the same (the Alaskan and Mexican property) and the proceeds and issues therefrom *to the payment*

*of the liabilities of the Washington-Alaska Bank,* in connection with your duties as receivers in the above-entitled action" (T. 952).

In his reply to the answer of the defendants, the appellee says:

"He admits that the said former receivers entered into the possession of the real property in Fairbanks precinct and proceeded to collect the rentals and royalties therefrom, and that there has been received by said receivers and their successors in office, this plaintiff, from the rentals and royalties on said property a large sum of money, the gross amount is upwards of $30,000.00 as stated, which he is holding subject to the terms and conditions of said trust deed."

"This plaintiff further admits that in the deed of the said Barnette and wife to the property in said Fairbanks District, it is provided that any of said property could be sold at any time on the agreement of said Barnette and wife and said receivers, and he admits that certain property covered by said transfer has been sold by the receiver and said Barnette and wife under and by virtue of the terms of said agreement and that the money realized from said sale has been delivered to said receiver. Plaintiff alleges that said money so received amounts to $2500.00 which he is holding subject to the terms and conditions of said trust deed."

"He admits that the property conveyed by the said Barnette and wife in said Fairbanks precinct consists of improved and income producing properties, the last of which is situate in the business section of Fairbanks, Alaska, and he alleges that the rentals therefrom aggregate approximately $450.00 per month at this time."

> "He admits that the said trust deed has been partially executed to the extent above set forth" (T. 183-4).

We therefore respectfully submit that the Court is in error when it states that Barnette stipulated in his deed that the receivers were not to take possession of the property conveyed nor the rents, issues and profits thereof, nor had any right to the possession or use thereof at any time prior to November 18, 1914, and that none of the proceeds of the property so surrendered by Barnette could be applied to the payment of the depositors and holders of unpaid drafts until the property and assets of the bank shall have been realized upon and devoted to liquidation.

The Court in its opinion says:

> "The receivers considered that their acceptance of the conveyance obligated them not to sue Barnette before the 18th of November, 1914, and the appellee so pleaded its effect in the reply."

Again we say that the Court is in error. There is not a single word of evidence in the record, outside of the petition filed by the receivers Hawkins and Mack, asking instructions from the Court as to what they should do with the trust deeds that in any wise shows what the receivers, who negotiated with Barnette, considered the effect of their acceptance of the trust deeds. F. G. Hawkins and E. H. Mack acted as receivers for the bank from the time that it closed until the 12th day of May, 1911, when they resigned.

The appellee, F. G. Noyes, was then appointed receiver and still continues to act as such.

The receiver Noyes in his reply to the answers of defendants alleges:

> "As to any negotiations between the said Barnette and the then receivers of said bank, or the *purpose thereof,* or as to any proposition made by said Barnette to said receiver or as to any promise and agreement made by the said Barnette to the said receivers, other than as the same are evidenced by deeds of Trust, referred to in said first separate affirmative answer, *this plaintiff has neither knowledge or information sufficient to form a belief* (T. 182).
>
> "This plaintiff alleges that said deed of trust is in writing and expresses for itself the terms and conditions thereof, the uses and purposes for which it was executed and delivered and the admissions, agreements and assumed obligations of said E. T. Barnette and his wife, *and this plaintiff has no knowledge nor information concerning such matters beyond the expressed terms of said deeds"* (T. 187). (Transcript of cross appeal 158).

The allegation contained in the appellee's reply that the acceptance "of said trust deeds operated as an agreement not to sue said Barnette prior to November 18, 1914," is merely the legal conclusion of appellee's attorney. The receivers who accepted the deeds under order of the Court informed the Court "that if these " deeds are accepted, it will be impracticable to pro- " ceed as contemplated to fix the liability against " E. T. Barnette in favor of the creditors of said bank

" by action in the Court here," and did not limit it to any specified term.

We shall further consider this matter hereafter.

### OBJECTS AND PURPOSES OF TRUST DEEDS.

The objects and purposes of said trust deeds, as shown by their recitals and by Barnette's petition, were (1) the desire and promise of Barnette and his wife to pay all of the creditors of said bank in full by not later than November 18, 1914; and (2) the desire of Barnette and his wife to "prevent the commencement of legal proceedings and the great and unnecessary expense" that said legal proceedings would entail, " based on the liability of the said E. T. Barnette to " the creditors of said Bank arising out of his manage- " ment of the affairs thereof, from March, 1908, up to " and including January 5, 1911, as its president and " one of the directors thereof."

From the time of the organization of the Fairbanks Banking Company, afterwards known as the Washington-Alaska Bank, until it closed its doors, E. T. Barnette had been its president and manager, a member of the Board of Diretcors, "and as such was active and influential in the control and management of its business affairs." At the time the bank closed Barnette was in the State of Washington. He left shortly thereafter for Fairbanks, Alaska, and there began negotiations with the then receivers for the purpose of preventing suit or action being instituted against him

"based on his liability to the creditors of said bank arising out of his management of the affairs thereof."

As a part of these negotiations, Barnette and wife on the 13th day of March, 1911, filed with the Court a petition accompanied by the two trust deeds, which petition among other things recited:

> "That your petitioners are informed and believe that certain legal proceedings are contemplated and about to be commenced against your petitioners in this Court; which said legal proceedings would subject the real estate and land, situate in the District of Alaska and belonging to your petitioners, to the order and process of the Court and prevent your petitioners from in any way dealing in or with or disposing thereof and all of which real estate and lands are mentioned in this petition; and which legal proceedings would entail great and unnecessary expense upon your petitioner; and that such legal proceedings relate directly to the connection of the said depositors with said Washington-Alaska Bank; and that your petitioners *desire to prevent the commencement of such legal proceedings and the incurring of the said unnecessary and great expense,* by surrendering all the real estate and lands of said petitioners to the said receivers in trust, and your petitioners say that it is their desire and intention of your petitioners, and each of them, that all said depositors in said Washington-Alaska Bank shall be paid in full their respective deposits with interest from January 4th, 1911, until paid, and not later than November 18th, 1914, and for that purpose and to that end they pray that if the depositors are not paid in full by said date that the receivers shall sell the real estate described in said Trust

deed and pay the proceeds thereof in payment of said depositors' accounts."

Each of the deeds also recited in effect that the receivers are about to commence an action (as Barnette and his wife are informed and believe) on behalf of creditors against him to recover from him the amount of any deficit that may be ascertained between the claims of creditors and the amounts realized out of the property and assets of the bank, *"Said action to be based on the liability of Barnette to said creditors arising out of his management of the affairs thereof."*

The deed further recites:

> "That in consideration of said liability of said E. T. Barnette to the creditors of said Washington-Alaska Bank growing out of his connection with the management of the business affairs thereof as its President and one of the directors, and by reason thereof, the said E. T. Barnette and Isabelle Barnette convey to the receivers in trust the property therein described for the uses and purposes therein stated, and the said E. T. Barnette has assumed and does now assume and take upon himself the obligation to pay the depositors and owners of unpaid drafts any deficit that may be hereafter ascertained as between the amount due to each depositor from said banking institution on the 9th day of January, 1911, together with interest, etc., and the amount realized out of the property and assets of said bank and *paid* to such creditors" (T., 1043-44).

It is therefore conclusive that the principal object of Barnette and his wife in executing and delivering said deed and in assuming the obligations therein contained, was their desire to pay all creditors in full by November 18, 1914, and their desire to prevent the commencement of legal proceedings and the incurring of great and "unnecessary expense" against Barnette. Why unnecessary expenses? Because Barnette intended to pay all the creditors in full. And in this connection it may be noted, that Barnette's promise to pay only included the depositors and holders of unpaid drafts. At the time of the execution of the Trust deeds and at the time of the acceptance of the same, the depositors and holders of unpaid drafts were the only creditors whom it was believed the assets of the bank would not pay in full. This is clear from the language of the Trust deeds, each of which recites that the bank was compelled to suspend its general banking business on the 5th of January, 1911, and "at said time was and is now unable to pay in "full its depositors and other creditors the owners "and holders of unpaid drafts" (T., 1028-1039), and further, "that it has at all times since appeared, and "is now apparent that there is and will be a large "deficiency as between the obligations of the said "banking institution to its depositors and owners of "unpaid drafts on the one side and the proceeds of "its property and assets on the other."

Whether this limitation to depositors and holders of

unpaid drafts was made because the other creditors were secured by collateral, as in the case of the Dexter Horton Bank, or whether there were any other creditors does not appear expressly—but by limiting the creditors who could not be paid out of the assets of the bank, to the depositors and holders of unpaid drafts, it is clearly shown by inference that Barnette and the receivers firmly believed that the other creditors, if any, were amply protected.

The lower Court, being of the opinion that the matters proposed by Barnette and his wife in their petition and Trust deeds were matters that should originate with the receivers, on March 14, 1911, directed that the petition and deeds be turned over to them "for their consideration." After six days' consideration, and on the 20th day of March, 1911, the receivers by and with the approval of their attorney, applied to the Court for instructions as to whether they should accept such Trust deeds and undertake the duties and responsibilities entailed thereby, or return the same to the grantors, and in their petition for instructions said receivers expressed the opinion, which their said attorney approved, "that if these deeds are " accepted, it will be impracticable to proceed as con- " templated, to fix a liability against E. T. Barnette, " one of the grantors, in favor of the creditors of said " bank, by action in court here."

Said petition further recites that the issues of the City lots in Fairbanks, amount to a considerable sum,

as much as ($650.00) per month net, and that so far as the receivers knew the property conveyed to them by said deed located in Fairbanks and on the nearby creeks is all the property owned by the said E. T. Barnette in Alaska, that would be subject to seizure on a judgment against him in this court; that the deed contained some valuable real estate that is the separate property of Isabelle Barnette.

It is therefore clear that the receivers understood that the acceptance of the deeds forever precluded them from bringing suit or action against Barnette on account of his liability to the creditors of the bank, or why should they inform the Court that if the deeds are accepted it will be impracticable *"to proceed as "contemplated to fix a liability against E. T. Bar-"nette in favor of the creditors of said bank by action "in court here."*

The word "impracticable" as we pointed out in our opening brief means: "Incapable of being effected "from lack of adequate means: impossible of per-"formance: not feasible: impossible: that which is "impossible cannot be done at all: that which is im-"practicable is theoretically impossible and cannot be "done under existing conditions" (Standard Dictionary).

Why did the receivers deem it impracticable? Simply because the consideration and only consideration—as to Barnette and wife—to support said deeds and the promises therein made to pay the creditors, was

the acceptance by the receivers of the conditions imposed by Barnette and wife that they *"surrender all "the real estate and land of said petitioners to said "receivers in trust" "to prevent the commencement of "such legal proceedings and the incurring of said "unnecessary and great expense"* (T., 946).

The receivers informed the Court that by accepting said deeds that they would not be able to proceed against Barnette, that it would be impossible to do so. That this was the receivers' understanding and that this was the understanding of Barnette and his wife, there can be no question, and when upon the 29th day of March, 1911, after more than a week's consideration, the Court ordered the receivers to "accept the Trust deeds" and take the proper and necessary steps to secure the same [the property therein described] and the *proceeds and issues therefrom to the payment of the liabilities of the Washington-Alaska Bank* in connection with your duties as receivers," the contract was complete and the receivers had surrendered up, for all time, their right to sue Barnette upon the original causes of action.

It is conclusive, therefore, that the principal object of the Trust deeds, and the *only consideration therefore,* was an agreement upon the part of the receiver not to sue Barnette on the original causes of action. The receiver and the Court have both recognized this fact; but have limited the duration of the agreement to a specified time, and this brings us to a con-

sideration of the contention made by the receiver, and as we claim erroneously upheld by this Court, that the acceptance of said Trust deeds operated as an agreement not to sue Barnette prior to November 8th, 1914.

And while the right of the appellants to have anything paid to the receivers in consideration of their agreement not to sue, applied in full or partial satisfaction of their liability, is not in the least affected by the question, as to whether said covenant or agreement not to sue is perpetual or limited as to time—nevertheless it is necessary to point out the error into which this Court has fallen in this respect in order to determine whether said agreement operated as a discharge of the original causes of action or not.

### THE ACCEPTANCE OF THE TRUST DEEDS DID NOT OPERATE AS AN AGREEMENT NOT TO SUE BARNETTE PRIOR TO NOVEMBER 18, 1914.

We most respectfully submit, that we are at a loss to understand how the lower Court and this Court reached such a conclusion. We are most emphatic in our statement that there is nothing in the petition filed by the Barnettes, the Trust deeds accompanying the same, the application of the receivers for instructions or the order of the Court thereon, or anything in the record, that in any wise suggests that *the legal proceedings and the great expense incident thereto,* which Barnette and his wife by their deeds, *sought*

*to avoid,* was only to be *postponed* until November 18, 1914.

The fact is that the very contrary appears. Barnette and wife say: "We desire to prevent the com-"mencement of legal proceedings against Barnette, "and to do so we hereby promise to pay the deposi-"tors, etc., and surrender all of our real estate and "land as security for the performance of said prom-"ise." And the receivers, in consideration thereof, by accepting the deeds agree with Barnette and his wife that they could not and would not sue him to enforce his liability to the creditors of the Bank.

We are at a loss to understand why it was that the 18th day of November, 1914, is picked as the limit of time, before which Barnette cannot be sued. This is the day on or before which Barnette agreed to pay the depositors and holders of unpaid drafts any balance with interest that might be then due them. And this is the day upon which the receivers are authorized—in the event that the claims of the depositors and holders of unpaid drafts have not been fully paid and satisfied, either out of the property or assets of said bank, as administrated by the receivers, or otherwise, or have not been paid by the said E. T. Barnette,—to take possession of the Mexican property and proceed to sell the same, as well as to sell the remaining Alaskan property, and apply the proceeds thereof in payment of the depositors and holders of unpaid drafts. This day was undoubtedly selected by

the receivers and Barnette as the date of payment, because on that day the sum of Two Hundred and Twenty-six Thousand and Twenty-five Dollars, and interest and other contingent sums became due and payable to Barnette from Ward and Beggs on account of their contract with regard to the Mexican property of which we have already spoken, and which, under the terms of the Mexican deed, the receivers had a right to collect, and "pay out to liquidate" any balance "that may remain unpaid of the claims and demands of the depositors and owners of unpaid drafts."

The only times, and the connections in which, "the 18th of November, 1914," is mentioned in any of the papers are as follows:

In the petition of Barnette and wife, to the Court, they state that they desire the receiver to hold the real estate in trust as security for the payment to said depositors of all moneys that shall be found due them after the affairs of the Washington-Alaska Bank shall have been wound up and the assets of said bank realized upon and paid over to said person "such trustee-" ship to continue until the *18th of November, 1914,* " provided the said E. T. Barnette and wife shall have " failed to pay to said depositors any deficit that may " be found to exist after the winding up of affairs of " said bank as aforesaid. It being the intent, desire " and express wish of said petitioners and they and " each of them do hereby promise and agree to pay

"the said depositors in full, not later than the *18th* "*day of November, 1914*" (T., 944).

In the petition (page 947 of Transcript) we find "that payment to the depositors shall be in full not later than *18th November, 1914,*" and again in the petition (T., 947), "That if depositors . . . be not paid in full . . . by *18th day of November, 1914,* then receiver shall sell all said real estate, etc."

In the Trust deeds we find the following mention of this date:

1. "That deficit not known at this time . . . but will be so ascertained by or before *November 18, 1914*" (T., 1033, 1043).

2. "But if it shall happen on *18 November, 1914,* "the demands of depositors and owners of unpaid "drafts . . . have not been fully paid and satis- "fied, etc.," Receiver may sell property and apply proceeds, etc. (T., 1033, 1044).

3. In the Mexican deed November 18, 1914, is given as the date when the moneys due from Ward and Beggs are to be paid.

So, then, this date was used only in connection with the following matters:

1. As the duration of the trusteeship.

2. As the date by which the deficit shall be ascertained.

3. As the date on or before which Barnette and wife promise to pay depositors and holders of unpaid drafts in full.

4. As the date that in the event Barnette and wife do not pay in full or said creditors are not paid out of assets of the bank, that the receiver is authorized to sell any property then unsold described in the Trust deeds.

It is therefore conclusive that the language used in connection with this date cannot be held to limit the duration of the receivers' agreement not to sue Barnette to that period.

What was to happen, if on the 18th day of November, 1914, the said creditors had not been paid out of the assets of said bank or otherwise or by E. T. Barnette?

The receivers were then authorized to sell the property and apply the proceeds upon the said claims. The receivers upon said date could not have brought suit upon Barnette's promise to pay said creditors because under the terms of the deed the real estate would first have to be realized on and applied in liquidation of the claims of said creditors. If there was an overplus, the same was to be returned to Barnette, if not, Barnette then became responsible for any balance due said creditors upon demand, but only upon the express conditions mentioned in the deed, namely:

"That after applying the proceeds of the prop-

> erty and assets of said Washington-Alaska bank, the amount collected by the receiver from George Edgar Ward and W. G. Beggs, if any, the proceeds of the sale of the real property situated in Mexico and the amount or amounts collected, if any, by the receiver from the rents and issues and sale of the Alaska property, *there still remained a balance due said depositors and holders of unpaid drafts,* that then Barnette was liable *to make good such balance or deficiency and pay same to the receivers upon demand"* (T. 1036, 1045).

Before then Barnette became subject to suit on account of his covenants contained in the deed, it required an exhaustion of all of the assets of the bank, the sale of the real property described in the Trust deeds and the application of all moneys received thereunder; in liquidation of the claims of the depositors and holders of unpaid drafts, and a *demand* by the receivers upon Barnette for the balance.

In order to uphold the position that the agreement is a covenant not to sue Barnette for a limited time, this Court must say that when Barnette transferred all of his real estate, situated in Alaska, which was "subject to seizure on a judgment against him," as well as all his property situated elsewhere, and had Mrs. Barnette convey some valuable real estate that was her separate property, in trust to the receivers, as security for their promise to pay said creditors in full by November 18th, 1914, any balance then due them, with the right in the receivers to take possession of the Alaska properties, collect the rents and issues thereof,

as well as to receive and pay any sum that might be paid by Ward and Beggs, and disburse the same pro rata, to the depositors and holders of unpaid drafts, at such time as the Court might direct, that the only thing that Barnette obtained, in consideration thereof, was a postponement of legal proceedings against him on account of his original liability to the creditors of the bank until 1914, or in the language of counsel for appellee (p. 58, Brief) this was "the price paid "by him for his peace until November 18th, 1914. "When that date came and Barnette's promise was un- "fulfilled the bar lifted and he became subject to "suit." Counsel undoubtedly means suit upon the original causes of action. Under this contention Barnette can perform all the promises contained in the Trust deeds, and still be called upon to respond to any other creditor of said bank if any, other than depositors and holders of unpaid drafts; and anything that has been paid by Barnette and wife as a consideration for having the "contemplated legal proceedings" postponed until November 18th, 1914, cannot be applied in full or partial satisfaction of his original liability even though the amount thereof many times exceeds the amount of his original liability.

Such a contention, we submit, is untenable; and if it be the law (which we submit it is not), that large sums of money paid as a consideration for a covenant not to sue for a limited time cannot be applied in full or partial satisfaction of the covenantee's liability—

though if said covenant is unlimited as to time, the consideration paid therefor may be applied in full or partial satisfaction of said liability—then we submit that a law so drastic, which affords the injured party more than one satisfaction, should not be enforced in a Court of Equity, unless the evidence of the intentions to so limit the covenant, is clear, convincing and unequivocal. We submit there is no such evidence in this record.

The agreement, if it did not operate as a release of Barnette, was certainly a covenant not to sue him and was unlimited as to time.

THERE WAS NO DUTY IMPOSED UPON THE RECEIVER TO EXHAUST ALL OF THE ASSETS OF THE BANK INCLUDING THE ASSETS WHICH MAY BE RECOVERED IN THE PRESENT CASE.

The law in dealing with joint tort-feasors plays no favorites. The injured party may sue one or all. All that the law looks to, is that the injury be satisfied. If said injury be satisfied, either by release of one joint tort-feasor or be partially or fully satisfied by one joint tort-feasor, as a consideration of a covenant not to sue him for a permanent or limited time, then anything received by the injured party must be applied in partial or full satisfaction of the liability of his joint tort-feasors.

Now in the case at bar, the receiver obtained from Barnette, a joint tort-feasor with the appellants, property of great value as security for the faithful per-

formance of Barnette's promise to pay the owners and holders of unpaid drafts any deficit that might remain upon the 18th day of November, 1914, between the amount due said creditors and the amount realized out of the assets of said bank and *paid to said creditors.* If upon said 18th day of November, 1914, the demands of said creditors were not paid either (1) out of the assets and property of said bank administered by said receivers or otherwise: or (2) have not been fully paid and satisfied by E. T. Barnette, then the receiver was authorized to sell the property and apply the proceeds thereof in liquidation of said claims.

At the time of the execution of said deeds, it was apparent as recited in the deeds that there was a large deficiency between the amount due said creditors on the one hand and the proceeds of the Bank's assets on the other and Barnette assumed to pay the same with interest. And at said time authorized the receiver to collect the rents and issues from the Alaska property and pay the same to the depositors and holders of unpaid drafts at such time as the Court might direct. It, thereby, became the duty of the receivers to apply the amount so collected in reduction of the claims of these creditors, because it was their duty to stop the running of interest as soon as possible. The receivers' right to the rents and issues of the Alaska properties became absolute the minute they were received by them, because there was a large deficiency between

the amount due said creditors and the amount to be realized out of the assets of the bank. (T. 215.)

Of course this Court does not know from the Record in this case as to whether Barnette has fulfilled his promise to pay said creditors or not. In the event he has not, then the receiver on the 18th of November, 1914, was authorized to sell both the Alaska and Mexican properties. Upon the trial it was proven uncontradicted that the value of the Alaskan property outside of the moneys collected, was the sum of Forty-Five Thousand Dollars ($45,000.00).

Under the terms of the deed the proceeds of the sale of the real property became absolutely the property of the receiver, if Barnette failed to meet his promises. So then, the receiver has obtained from Barnette in consideration of his covenant not to sue Barnette, up to April, 1914, the sum of Thirty Thousand, Nine Hundred and Five Dollars and Sixty-five cents ($30,905.65) and real-estate of the value of ($45,000.00) at the time of trial, situate in Alaska, to say nothing of the property situated in Mexico.

We submit that even if said Trust deeds did not operate to release Barnette from his original liability, but only as a covenant not to sue him, that nevertheless it was on account of the wrongs done the bank that the receiver obtained this money and property and to that extent the claim of the appellee against these appellants must be reduced.

It is true that in the recitals of both trust deeds, it

is set forth, that E. T. Barnette has assumed the obligation to pay the depositors and owners of unpaid drafts, any deficit that may hereafter be ascertained as between the amounts due depositors and owners of unpaid drafts, with interest, and the amount realized out of the property and assets of said bank and paid to such creditors. That the amount of such deficit cannot be ascertained at any particular period of time, but will be so ascertained prior or before November 18th, 1914.

There is nothing in this recital that is inconsistent with Barnette's covenant to pay said creditors in full upon said date. If upon said date, Barnette had not paid the same, or the same was not paid out of the assets of the bank, Barnette's property was subject to the payment of the same.

Under this recital, not only must the assets of the bank have been realized on, but the amount thereof must be paid to such creditors, and this very thing seems to have been in the minds of the parties when Barnette in the trust deed authorized the receivers to sell the property and apply the proceeds thereof in payment of any amount that had not been fully paid and satisfied, either out of the property and assets of said bank, as administered by the receivers or otherwise or paid by E. T. Barnette.

The recital that the amount of said deficit will be ascertained on or by November 18th, 1914, cannot affect Barnette's obligation to pay on said date. To

illustrate: all of the assets of said bank, after the receiver had realized on the most valuable ones, could have been sold under order of the Court to thoroughly responsible parties on time payments; the amount realized from all of the assets would at that time be definitely known as also the amount of the deficit between the claims of said creditors and the amounts realized from the assets of said bank and paid to such creditors.

So then, we submit that there is nothing that required the receiver to exhaust all of the assets of said bank before Barnette's liability and obligation to pay became fixed and likewise there was no duty imposed upon the receivers to pursue the asset which may be recovered in this case.

### ACCORD AND SATISFACTION.

We submit that the Court is in error in holding that the acceptance of the Trust deeds did not operate as a release of Barnette, on account of his admitted liability to the creditors of the bank. It is true that there are no words of expressed release set forth in the petitions or Trust deeds. This is not necessary. A release may be implied from all the facts and circumstances surrounding the transaction. It is a matter of intent. We say that such an intent can be gathered from the record in this case and that the agreements constitute something more than a mere covenant not to sue. We say that the promise of Bar-

nette to pay by November 18, 1914, any deficit that might then be due the depositors and owners of unpaid drafts and the transfer by Barnette and his wife of all of their property to secure the performance of said promise, was the substitution of an agreement for the liability of a tort and was accepted in satisfaction of the tort. The very fact that the Trust deeds provided the manner in which Barnette was to become liable for any balance that might be due said creditors after all of the assets of the bank and the assets derived from the sale and income of the Barnette properties had been applied in liquidation thereof, conclusively to our mind shows that Barnette was released on the original causes of action. It is true as stated by the Court that an accord and satisfaction requires an agreement, an *aggregatio mentium*, and it must finally and definitely close the matter covered by it. Nothing of or pertaining to that matter must be left unsettled or open to further question or arrangement. We submit that there was nothing of or pertaining to Barnette's liability to the creditors of the bank that was left unsettled or open to further question or arrangement. That liability was completely discharged and he assumed a new responsibility, namely: to pay the depositors and holders of unpaid drafts any deficit due them by November 18th, 1914. It is true that it was apparent that the amount of this deficiency was very large, that the amount thereof could not then be definitely ascertained, but this in no wise affected Bar-

nette's promise to pay or left the manner of his original liability open to further question or arrangement.

The test of this matter is, could the receiver bring suit after the execution of these Trust deeds against Barnette, based upon his original liability to the creditors of the bank. If he could, there was of course no discharge or release, if he could not, there was.

An absolute covenant not to sue one or less than all of several joint tort-feasors never operates as a release, and not even the covenantee can plead it as a defense, for such a covenant does not extinguish the cause of action, but he must seek his remedy in an action on the covenant. *A fortiori,* a limited covenant would so operate. However, whatever consideration is received for the agreement or covenant not to sue must be applied to the payment *pro tanto* of the recovery against the other wrong doers. (34 *Cyc.,* 1090).

See *Miller* v. *Fenton,* 11 Paige, 20, discussed in our opening brief, page 189, and the following authorities:

*Parry Mfg. Co.* v. *Crull,* 101 N. E., 759;
*Cleveland* v. *R. Co.,* 86 N. E., 485;
*Chicago R. R.* v. *Averill,* 127 Ill. App., 275; 224 Ill., 516;
*City of Chicago* v. *Babcock,* 143 Ill., 358;
*Fitzgerald* v. *Union Stock Co.,* 33 L. R. A. (N. S.), 983;
*Snow* v. *Chandler,* 10 N. H., 92;
*Knapp* v. *Roche,* 94 N. Y., 329;

*Bloss* v. *Plymale,* 3 W. Va., 393;
*Chamberlin* v. *Murphy,* 41 Vt., 110, 119;
*Irvine* v. *Mulbank,* 15 Abb. Pr. (N. S.), 378;
*Louisville* v. *Barnes,* 117 Ky., 860;
*Carey* v. *Bibby,* 129 Fed., 203;
*El Paso* v. *Darr,* 93 S. W., 167;
*Edens* v. *Fletcher,* 79 Kan., 139, 147;
*Robinson* v. *Trammell,* 83 S. W., 258, 265;
*Chicago* v. *Smith,* 95 Ill. App., 340;
*Arnett* v. *Missouri Pac.,* 64 Mo. App., 368, 375;
*Bailey* v. *Delta,* 86 Miss., 634;
*Dury* v. *Connecticut,* 86 Conn., 74;
*Abb.* v. *R. R. Co.,* 58 L. R. A., 290;
*Judd* v. *Walker,* 158 Mo. App., 167;
*McDonald* v. *Grocery,* 184 Mo. App., 432;
*Ellis* v. *Esson,* 50 Wis., 138;
*Smith* v. *Gayle,* 58 Ala., 600;
*Meixell* v. *Kirkpatrick,* 29 Kan., 679, 684;
*Merchants Nat'l Bank* v. *Curtis,* 37 Barb., 317;
*Bowman* v. *Davis,* 13 Colo., 297, 22 Pac., 507;
*Heyer Bros.* v. *Carr,* 6 R. I., 45;
*Home Telephone Co.* v. *Fields,* 150 Ala., 306, 312.

*Judd* v. *Walker,* 158 Mo. App., 156; 138 S. W., 635, was a suit for damages for the fraud and deceit of Fred Naxera and Allen M. Walker. While the

suit was pending the plaintiff executed a writing in words and figures as follows:

> "In consideration of the payment of the sum of $350.00 by Fred Naxera to Ball and Sparrow, attorneys for plaintiff it is agreed that the case so far as Fred Naxera is concerned, shall be dismissed and that the further prosecution of the same be only against Allen M. Walker.
>
> Feb. 20, 1909, Ball & Sparrow,
>
> Attorneys for Plaintiff."

The Court after citing *Lovejoy* v. *Murrey,* 3 Wall., 1, to the effect that there can be but one satisfaction for a wrong; that such is the only just and equitable rule of decision, say:

> "In accord with these principles, it is obvious the principles of natural justice alone require that the plaintiff's recovery, if any, against Walker should be diminished to the extent he has been mitigated by Naxera, for, though there be no release such payment by one tort feasor are available *pro tanto* to the use of the other as a matter of mitigation in the final award of damages accrued because of the tort of both."

In the case of *Goetjens* v. *City of New York,* 145 App. Div. (N. Y.), 640, 130 N. Y. S., 405, plaintiffs sued three defendants for negligence. Pending trial the plaintiff made a settlement with two of the defendants for $2000.00 and thereupon an order was made discontinuing the action as to them and left a sole defendant. The jury were instructed that any

question of damages involved the deduction of the $2000.00 paid by the dismissed defendants.

The Appellate Court in affirming the judgment said:

> "The complaint is upon an alleged joint tort. The plaintiff has received satisfaction to the extent of $2,000.00. The effect of the stipulation and the order was a covenant not to sue the other tort feasor. *Gilbert* v. *Finch,* (73 N. Y., 455, 466.) But plaintiff was entitled *to pursue this defendant for only so much of the compensation for the injury as has not been paid. Otherwise he could receive some compensation for his injuries from two of the joint tort feasors and yet full compensation therefor from the other tort feasors.*"

In the case of *St. Louis etc.* v. *Bass,* 140 S. W., 860, plaintiff released two railroad companies from liability from personal injury due to joint negligence. The Court limited the recovery from the third company to the damages sustained in excess of the amount paid under settlement.

> "And if the consideration which the plaintiff has received from one joint tort feasor is the full amount of the damages he has suffered, no further recovery can be had against the other tort feasor."

*Button* v. *Louisville,* 118 S. W., 977.

In the case of *Atchison etc.,* v. *Classin,* 134 S. W., 358, the sum of $215.00 was paid by one railroad company on the understanding that it should not debar suit against the other. The defendant claimed

that the effect of this payment operated as a release as to it. But the Court said:

> "We concluded that the release did not operate to bar plaintiff's right to sue the defendant. There was nothing disclosed showing liability on the part of any of the companies named in the release for this occurrence and they were not joint tort feasors with defendant. The release negatives any admission of liability by reason of the payment of the $215.00, and in connection with this the testimony of plaintiff on the subject which was not contradicted, showed that it was a gratuity and not intended as compensation for plaintiff's claim. However, it was on account of his injury, that he received the payment—and to that extent we think plaintiff's recovery should be reduced."

Accord and *part performance* do not constitute a satisfaction. If performed in part only, the original right of action remains and the party to be charged is allowed what he has paid in diminution of the amount claimed.

> 1 C. J., 533, sec. 21, citing
> *King* v. *Atlantic etc.,* 157, N. C., 44-54.
> *Brunswick* v. *R. Co.,* 80 Ga., 534-9.

As was said in *King* v. *R. R.,* 157 N. C., 54,

> "As long as the accord as executory, although it is partially performed, the original cause of action is not extinguished, and an action may be brought upon it, and the remedy of the defendant is to *plead* his part performance as a satisfaction *pro tanto.* He gets credit for all he has paid upon it."

It is not essential in an accord and satisfaction or compromise more than in other contracts that the agreement be expressed. It may be implied from circumstances indicating the intention of the parties.

*Hunt on Accord & Satisfaction,* p. 25,
7 C. J., 509.

In 24 *Am. & Eng. Ency. Law* (2 ed., p. 307) the law is stated as follows:

> "But it is the well settled rule that, where a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court or jury whether or not what the releaser has received was received in full satisfaction of his wrongs; and if it appears that it was not so received it is only *pro tanto* a bar to an action against the other wrongdoers."

FAILURE TO PLEAD THE STATUTE.

Appellants asked for a reversal of the judgment in this case, among other reasons, because the statute of Nevada relating to reduction of the capital stock and payment of dividends was not pleaded and was not found as a fact.

In discussing this point in the opinion the Court makes two answers to this proposition:

1st: That the complaint stated a cause of action at common law, and

2nd: That the court below was entitled to judicially notice the Nevada Statute.

NO COMMON LAW CAUSE OF ACTION STATED.

We respectfully submit that the Bill does not state a cause of action at common law, for the reason that at common law it would have been necessary, in order to charge these defendants with liability, to bring home to them knowledge of the insolvency of the Bank at the time the stock purchases were made, or, in the alternative, their failure to exercise such care in the administration of their offices as would have necessarily resulted in their acquiring such knowledge.

In the opinion the Court says:

> "The complaint did not lack the necessary averments to constitute a cause of action. It alleged that the dividend was wrongfully and unlawfully and fraudulently declared and paid, and sets forth facts to sustain the allegation, and also alleges facts to show that the monies paid out for the surrender of stock certificates were fraudulently and illegally paid out of the capital of the corporation. Those allegations were sufficient to constitute a cause of action at common law:"

We respectfully submit that the allegations of the complaint are not sufficient to sustain a cause of action at the common law.

Of course, the words "wrongfully and unlawfully" add nothing to the pleading. The only allegations

of the complaint on the subject of the unlawful reduction of the capital stock, are as follows:

Paragraph XIX:

> "Shortly after said corporation, the Fairbanks Banking Company, commenced business, said corporation wrongfully and unlawfully began to reduce its issued capital stock by accepting the surrender thereof and giving in return therefor either cash or the stock subscription notes given for said stock, a list of which stock so surrendered together with the date of surrender, the number of shares surrendered, the name of the party surrendering and the amount of cash or the subscription notes returned therefor, is as follows."

Then follows a list aggregating the sum of $56,000. The complaint then goes on:

> "That during all the time from and including said June 30, 1908, to and including said October 25, 1910, the liabilities of said corporation to its general creditors greatly exceeded its assets, and by accepting the surrender of its capital stock and returning therefor cash or subscription notes as aforesaid, the assets of said corporation to which said creditors could look for payment of their claims were further decreased, and the same were, in the manner and amounts aforesaid, withdrawn and divided among said stockholders of said corporation; *that the surrender of said stock and the return of said cash and notes* as above set forth, were made to and by said corporation with full knowledge, consent and approval of the defendants and each of them who constituted its Board of Directors and officers on the dates aforesaid, or by the exercise of ordinary care the same could

have been known to them and each of them; that the terms of office of the defendants herein as officers and directors of said Fairbanks Banking Company, a corporation, were as follows:"

Then follows a list of the officers and directors with their terms of office.

We beg to call the Court's attention to this allegation. It will be noted that nowhere is it alleged that *the directors knew that the liabilities of the corporation to its general creditors exceeded its assets,* or that by the exercise of ordinary care could they have known that fact, nor does it appear from this allegation that the directors did know, or by the exercise of ordinary care could have known that the payment for said stock so surrendered was not made out of surplus or net profits (Tr., p. 21).

There is no finding that the liabilities of the corporation to its general creditors exceeded its assets. The only finding bearing upon the subject is No. LI (p. 209), "that when stock was so taken back by the "corporation the amounts paid therefor were either "paid in cash or the notes held by the bank were "cancelled and surrendered to the stockholders; that "said bank had no surplus or undivided profits "against which the same could be charged."

There is absolutely no finding of any knowledge on the part of the defendants, or that they could have obtained the knowledge by ordinary care, that the bank had not a surplus against which these stock sur-

renders could be charged. The substance of the finding is that the directors acquiesced in the stock surrenders and in some cases approved of them (Finding LIV, p. 211); but nowhere does it appear from the findings that the directors had or by the exercise of ordinary care could have had any knowledge of any facts showing or tending to show that there was no surplus or undivided profits against which the stock surrenders could be charged.

For these reasons we respectfully urge that the Court is in error in its statement that the facts set forth in the complaint sustain the allegation that the moneys paid out for the surrender of the stock certificates were fraudulently and illegally paid out of the capital of the corporation.

In order for there to be a cause of action stated at the common law charging these directors with responsibility for the payment of the moneys in the purchase of the surrendered stock, it was essential that the complaint should directly allege either that the directors knew that the corporation had no surplus or undivided profits, or that in the exercise of ordinary care they would have so known. Even taking the finding and the complaint together, there is not enough by patching allegation with finding to state a cause of action at the common law, were such a course permissible; but, of course, the defect of allegation in the complaint is not cured by finding, nor is the find-

ing of any materiality where it is not responsive to some allegation of the pleading.

The opinion also says:

> "It alleged that the dividend was wrongfully and unlawfully and fraudulently declared and paid and sets forth facts to sustain the allegation."

Again, we submit, the Court is in error. It is alleged that

> "on the 12th day of April, 1910, said Fairbanks Banking Company acting by its then Board of Directors, by a resolution entered on the minutes of the said Fairbanks Banking Company, a corporation, wrongfully and fraudulently declared and ordered to be paid on its then outstanding capital stock of $168,600, a dividend of 20%, amounting to $33,720, which said dividend was thereupon actually paid to the then stockholders of the Fairbanks Banking Company, a corporation (Par. 26, page 30)."
>
> "On said 12th day of April, 1910, at and before the time when the same was ordered to be paid, the said Fairbanks Banking Company, a corporation, was and long prior thereto had been in a grossly insolvent and failing condition . . . said Fairbanks Banking Company, a corporation, had in fact, on said date, no earnings, surplus or undivided profits on hand out of which said dividend could legally be paid, but on the contrary had at and prior to said date, neither capital nor surplus. . . . (Par. 27, page 31)."

There is no finding covering this allegation. The finding is (61, p. 214) that at the time the said dividend was so declared and paid, the said Fairbanks

Banking Company did not have any surplus or undivided profits out of which the same could be declared and paid.

There is no finding whatever that the dividend was paid by the Bank with the knowledge, consent and approval of the defendant out of, by and with the funds and moneys of the depositors of the Bank, and not by, out of, or with the surplus earnings, or undivided profits of the Bank.

### JUDICIAL KNOWLEDGE OF THE NEVADA LAW.

The Court says again:

> "It is our opinion that the Court below was authorized to take judicial cognizance of the law of Nevada,"

and cites,

*Mills* v. *Green,* 159 U. S., 651, 657,

as follows:

> "The lower courts of the United States, and this court on appeal from their decisions, take judicial notice of the constitution and public laws of each state of the Union."

The Court goes on to say:

> "The District Court of the Territory of Alaska is, we think, one of the 'lower courts of the United States' to which the rule applies, and while we find no adjudication to that precise effect it is significant that in *Cheever* v. *Wilson,* 9 Wall, 108,

the Court held that the rule is applicable to the Courts of the District of Columbia."

We respectfully urge that the Court has fallen into a serious error here and that if the opinion is allowed to stand, it is likely to constitute a future source of confusion and uncertainty as to the status of the District Court of Alaska.

### THE ALASKA COURT IS NOT A UNITED STATES COURT.

If the District Court of the Territory of Alaska is a lower court of the United States within the meaning of the rule that courts of the United States take judicial notice of the laws of the various States, then it is a lower court of the United States for other purposes.

For example—as to the manner of empaneling grand jurors, *Reynolds* v. *U. S.,* 98 U. S., 145; the mode of charging petit juries, *Miles* v. *U. S.,* 103 U. S., 304; the right of defendants to separate trials and the regulation of peremptory challenges to juries, *Cochran* v. *U. S.,* 77 C. C. A., 432, 147 Fed., 206.

The Court refers to the decision in *Cheever* v. *Wilson,* 9 Wall., 108, that the Supreme Court of the District of Columbia is a lower court of the United States.

The rule that the courts of the District of Colum-

bia are lower courts of the United States has long been settled.

*Embry* v. *Palmer,* 107 U. S., 3;
*Moore* v. *Pywell,* 9 L. R. A., 1078.

The decisions of the Supreme Court of the United States draw the distinction between (1) the Federal courts established under Article 3 of the Constitution, and (2) the courts established under Section 8 of Article 1 of the Constitution conferring upon Congress the power of exclusive legislation over such district as might become the seat of government, and (3) the courts established by Congress for territories under Article 4 conferring power upon it to make all needful rules and regulations respecting the territory belonging to the United States.

The courts established under Article 3 of the Constitution are treated as courts of the United States proper. Those courts created under Section 8 of Article 1 of the Constitution are designated as legislative courts, but nevertheless courts of the United States.

As was said in *Embry* v. *Palmer,* 167 U. S., 3-9,

> "That the Supreme Court of the District of Columbia is a court of the United States, results from the right of exclusive legislation over the District, which the Constitution has given to Congress."

The third class, those created under Article 4, are also designated as legislative or territorial courts, and

although having the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District courts of the United States, this does not—in the language of the U. S. Supreme Court in *Reynolds* v. *U. S.*, 98 U. S., 145-154:

> "make them circuit or district courts of the United States. We have so often decided. *American Insurance Co.* v. *Canter,* 1 Pet., 511; *Benner* v. *Porter,* 9 How., 235; *Clinton* v. *Englebrecht,* 13 Wall., 434. They are courts of the *territories invested for some purpose with the powers of the courts of the United States.*"

The Court of Appeal of the District of Columbia in *Moss* v. *United States,* 23 App. Cases, D. C., 475-481, has clearly pointed out this distinction. The Court said:

> "Now it is contended on the part of the United States that the Supreme Court of the District of Columbia is not a court of the United States, within the meaning of Sec. 725 of the Revised Statutes of the United States, U. S. Comp. Stat., 1901, p. 582, and that therefore the said section does not apply in this case.
>
> "And this presents a question that has often been presented and discussed, and, as we think, definitely decided by the highest authority.
>
> "But why is the Supreme Court of this District not a court of the United States within the meaning of the term 'Courts of the United States,' as employed in the act of 1831, and Section 729 of the revised Statutes? It is said that the judicial power imparted to it is not a part of the judicial

power delegated to the United States by Article 3, Section 1 of the Constitution. But that was but a general delegation of judicial power, and should be construed in connection with all the delegated power confided to the United States government by the Constitution. That provision of the Constitution which declares (Art. 1, Sec. 8) that Congress shall exercise exclusive legislation in all cases whatsoever, over such district (not exceeding, etc.) by cession of particular states, and the acceptance of Congress as shall become the seat of the government of the United States, vest in Congress plenary power over the district for all purposes. Such grant of power necessarily implies the power of Congress to ordain and establish such courts as should be found necessary for the orderly and proper government of the district and the people residing therein; the cession to be made and accepted by Congress for the United States as a *permanent* seat of government organized under the Constitution. And though the courts of the district are created and established by act of Congress the power for such creation and establishment is no less derived from the Constitution than the power under Article 3, Section 1 of the Constitution to ordain and establish inferior courts to the Supreme Court of the United States. All courts thus established by Congress, while the creations of Congress, are authorized by the Constitution and are therefore courts of the United States for the administration of the laws of the United States. The courts of general jurisdiction of the District of Columbia are certainly not mere municipal courts; and *they have always been distinguished from mere territorial courts,* created for a temporary purpose and the judges of which may be appointed for a limited term subject to removal by the President. Indeed the courts of general jurisdiction of this district have been treated and regarded from the

time of their first creation and establishment down to the present times as courts of the United States and it is difficult to perceive how they could be otherwise designated. They have been so declared by the Supreme Court of the United States upon more than one occasion. *Embry* v. *Palmer,* 167 U. S., 3-20; *Phillips* v. *Negley,* 117 U. S., 665-674-5. . . .

"In addition to the foregoing consideration and authority for maintaining that the Supreme Court of this district is a court of the United States, Congress in adopting the code of laws for this district by Sec. 31 thereof, has declared that the Supreme Court of this district 'shall possess the same powers and exercise the same jurisdiction as the circuit and district courts of the United States and *shall be deemed a court of the United States,*' and by Sec. 1 of the code it is declared that all general Acts of Congress not locally inapplicable in the District of Columbia—shall remain in force in said district. These, however, are nothing more than general legislative declarations in affirmance of pre-existing decisions upon the subject."

See also

*Moore* v. *Pywell,* 29 App. Cas., 312, 9 L. R. A. (N. S.), 1078.

A long established line of decisions holds that territorial courts are not courts of the United States:

*McAllister* v. *U. S.,* 141 U. S., 174;
*Parsons* v. *U. S.,* 167 U. S., 324;
*Hornbuckle* v. *Toombs,* 18 Wall., 648;
*Reynolds* v. *U. S.,* 98 U. S., 145;
*Benner* v. *Porter,* 9 How., 235;

*American Insurance Co.* v. *Cauter,* 1 Pet., 511;
*Page* v. *Burnstine,* 102 U. S., 664;
*Good* v. *Martin,* 95 U. S., 90;
*U. S.* v. *Coe,* 155 U. S., 76;
*Clinton* v. *Englebrecht,* 13 Wall., 434;
*U. S.* v. *McMillan,* 165 U. S., 504;
*Steamer Coquitlam* v. *U. S.,* 163 U. S., 346.

They are courts of the Territories invested for some purposes with the powers of courts of the United States.

*Reynolds* v. *U. S.,* 98 U. S., 145.

In *Summers* v. *U. S.,* 202 Fed., 457, 461, this Court, speaking through Gilbert, C. J., and referring to this line of decisions, said:

> "It is true that these decisions hold that the territorial courts are not courts of the United States, but are legislative courts of the territories, and that the manner of summoning and impaneling jurors, the *practice, pleadings,* forms and modes of procedure, qualifications of witnesses and forms of indictment prescribed by statute for the Circuit and District Courts of the United States *have no application to them,* but that they are required to follow the territorial law in all those respects, unless it be otherwise provided by a statute of the United States."

In the Summers case the question was whether an indictment in the Alaska court must charge one crime only and in one form only as provided by the Alaska

Code, or whether the provisions of U. S. Rev. Stat., Section 1024, allowing two or more counts in one indictment would apply, and notwithstanding the language above quoted from the opinion this Court held that Section 1024, Rev. Stats., did apply.

The Summers case, however, was reversed on appeal to the Supreme Court, *Summers* v. *U. S.*, 231 U. S., 92, the Court saying:

> "It is established that the courts of the territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts, but this does not make them circuit and district courts of the United States. It has been hence decided that the manner of impaneling grand juries prescribed for the circuit and district courts does not apply to the territorial courts. *Reynolds* v. *United States,* 98 U. S., 145, 154, 25 L. Ed., 244, 246. See, as to trial juries, *Clinton* v. *Englebrecht,* 13 Wall., 434, 20 L. Ed., 659. In the latter case it was said 'that the whole subject-matter of jurors in the territories is committed to territorial regulation' (p. 445).
>
> "This principle was applied to the mode of challenging petit jurors *(Miles* v. *United States,* 103 U. S., 304, 26 L. Ed., 481) ; to give defendants the right to separate trials and for the regulation of peremptory challenges to jurors *(Cochran* v. *United States,* Circuit Court of Appeals, eighth circuit, 77 C. C. A., 432, 147 Fed., 206, 207). In *Fitzpatrick* v. *United States,* 178 U. S., 304, 307, 308, 44 L. Ed., 1078, 1080, 1081, 20 Sup. Ct. Rep., 944, it was said that the laws of Oregon must be looked to for the requisites of an indictment for murder, rather than the rules of the common

> law. And this by virtue of the act providing a civil government for Alaska. . . See also *Thiede* v. *Utah,* 159 U. S., 510, 40 L. Ed., 237, 16 Sup. Ct. Rep., 62."

*Summers* v. *United States,* 231 U. S., 141.

And it was expressly held in *McAllister* v. *U. S.,* 141 U. S., 174, that the District Court of Alaska is not a court of the United States.

And again in

*Jackson* v. *U. S.,* 102 Fed., 473,

this Court, speaking through Hawley, J., said:

> "The District Court of the District of Alaska is not strictly speaking a court of the United States and does not come within the purview of acts of Congress which speak of 'Courts of the United States' only."

Citing

*Clinton* v. *Englebrecht,* 13 Wall., 434;
*Reynolds* v. *U. S.,* 98 U. S., 145, 154;
*McAllister* v. *U. S.,* 141 U. S., 174;
*Thiede* v. *Utah,* 159 U. S., 510, 514, 515;
*U. S.* v. *McMillan,* 165 U. S., 504, 510.

By the Act of 1884, the laws of Oregon were extended to Alaska. At that time the Oregon Code of

Civil Procedure provided (Sec. 720) of what facts judicial notice should be taken.

> "3. Public and private official acts of the legislative, executive and judicial departments of this State and of the United States."

It was held by the Oregon court that they would not take judicial notice of the laws of another State.

> *Scott* v. *Ford,* 97 Pac., 99;
> *Cressy* v. *Taton,* 9 Ore., 541;
> *Goodwin* v. *Morris,* 9 Ore., 322;
> *Balfour* v. *Davis,* 14 Ore., 47, 12 Pac., 89.

And that law having been extended to Alaska is the rule of decision of the courts of that Territory.

### DEPARTURE FROM LAW TO LAW.

But assuming for the sake of argument that the Alaska Court was entitled to take judicial notice of the Nevada law, we still contend that the failure to plead the Nevada law is fatal to the right to recover, and in support of our position we refer the Court to the case of *Union Pacific Railway Co.* v. *Wyler,* 9 Wall., 108. In that case plaintiff brought an action in the Missouri court against the defendant corporation, for a personal injury, alleging that defendant employed as a fellow servant of plaintiff, one K., who was, and was known to defendant to be, incompetent and unfit for his position, and that through the negligence of defendant in employing said K. the injury

happened. The cause was removed to the Federal Court, and after proceedings there plaintiff amended his petition by adding an averment that the injury resulted from the negligence of defendant, its agents and servants, and in consequence of the negligence of said K. Subsequently plaintiff again amended his petition by omitting the allegations as to the incompetency of K. and defendant's knowledge thereof, and rested the cause of action solely on the negligence of K. under a statute of Kansas, in which State the injury occurred, giving a right of action for the negligence of a fellow servant, which statute was pleaded.

It was held that the second amended petition by changing the ground of the action from the general law to a special statute, constituted a departure, and set up a new and different cause of action from that stated in the former petitions. The Court said:

> "It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure

from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is *a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right.* It is true that the federal courts take judicial notice of the laws of the several states. *Priestman* v. *U. S.*, 4 Dall., 28; *Owings* v. *Hull,* 9 Pet., 607; *Drawbridge Co.* v. *Shepherd,* 20 How., 227; *Cheever* v. *Wilson,* 9 Wall., 108; *Junction R. Co.* v. *Bank of Ashland,* 12 Wall., 226. This rule, however, does not affect the present suit, which was commenced in the court of Missouri. *Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes, which is a matter of evidence.* The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of parliament, yet there a departure is made, and a new cause of action is asserted, when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute."

The question that presents itself here is: "Can "plaintiff recover from the defendants for a statutory "liability when the cause of action set forth in the "amended complaint alleges a common law liability, "the essentials necessary to create such common law "liability not having been found by the Court?"

In other words, this Court has found as a matter

of law that the corporation had a right to purchase and receive back its own stock, provided that payment for the same was made out of its surplus and not out of its capital. And the Court has found that as the directors permitted stock to be surrendered back to the corporation and that the payment of the same was not made out of any "surplus or net profits," that the same was in violation of the laws of Nevada and that the directors permitting the same were liable, irrespective of the question as to whether or not the directors knew, or by the exercise of reasonable care should have known, that there was no surplus or net profits out of which the same could be paid.

This Court has found that the complaint did not lack necessary averments to constitute a cause of action at common law. It is thus evident that plaintiff was seeking to charge defendants with a common law liability, *and not* on account of any statutory liability, yet the lower Court found the defendants' acts were illegal and wrongful, and in violation of the laws of the State of Nevada, not in violation of the common law where the measure of a director's liability is based on principle different from the statutory law, but under the laws of the State of Nevada. We contend this cannot be done.

The Court will not resort to its judicial knowledge of state legislation in order to help out the pleadings. 7 *Encyc.,* U. S. Rep., 696.

Appellants have gone into these matters more fully perhaps than is usual on applications of this character. It has seemed necessary, however, in order to make appellants' position clear. If they have transgressed in this regard they ask the Court's indulgence.

Respectfully submitted.

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